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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1987

JOHN M. KERR,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

A defendant in state court, in a politically charged atmosphere, is convicted utilizing the testimony from the grave of the alleged principal co-conspirator. The dead man's testimony, nineteen separate times, is introduced through the words of others. The testimony involves neither a dying declaration nor prior recorded testimony.

1. Did the use of the testimony from the grave violate the Petitioner's right to confront his accuser under the Sixth and Fourteenth Amendments to the United States Constitution?

2. Are state court decisions constitutionally valid which hold that a defendant's right to confrontation is satisfied merely by the appearance in court of those repeating the hearsay?

3. Is a state court, under the Due Process Clause of the Fourteenth Amendment, required to apply the *Dutton v. Evans*, 400 U.S. 74 (1970), "indicia of reliability" test to the challenged out-of-court declarations?

4. Whether a Pennsylvania Common Law Rule of Evidence Allowing the Admission of Testimony of a Dead Man Can Not Be Substituted for the Prosecution's Duty to Confront the Accused at Public Trial [or Constitutionally Recognized Substitute] Pursuant to the Sixth Amendment of the Constitution of the United States as Applied to the Respective States Via the Fourteenth Amendment?

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COMMONWEALTH OF PENNSYLVANIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, denying allowance of appeal, entered in this proceeding on May 5, 1987.

OPINIONS BELOW

The memorandum decision of the majority of the panel of the Superior Court of Pennsylvania, as well as the dissenting statement, has not been reported. The majority opinion is reprinted in the Appendix hereto, p. 1-A, *infra*. The dissenting statement is reprinted in the Appendix hereto, p. 6-A, *infra*. The opinion of the Dauphin County Court of Common Pleas (trial court) is reported at 105 Dauph. 444 (1985), and is reprinted in the Appendix hereto, p. 8-A, *infra*.

STATEMENT OF JURISDICTION

This case was decided and judgment of sentence entered by the Dauphin County Court of Common Pleas on April 11, 1985. A panel of three Judges of the Pennsylvania Superior Court, by a majority vote, affirmed the judgment of sentence on September 8, 1986. Application for Reargument before the Superior Court *en banc* was denied, *per curiam*, on October 23, 1986. The Pennsylvania Supreme Court denied the Petition for Allowance for Appeal on May 5, 1987. On June 24, 1987, Justice Brennan signed an order extending the time for filing this petition for certiorari to and including August 3, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense.

U.S. Constitution, Amendment XIV:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

This case concerns whether the Confrontation Clause of the Sixth Amendment, made applicable to the states via the 14th Amendment, *Pointer v. Texas*, 380 U.S. 400 (1965), requires the exclusion of the repeated hearsay of a deceased, non-testifying alleged principal co-conspirator, which has not been shown to have "particularized indicia of reliability," and which does not involve either a) a dying declaration or b) prior recorded testimony.

The trial court, characterizing the matter before it as "a scheme of political malpractice" (8-A), in the midst of intense media exposure and a major political campaign in which the prosecuting Attorney General was himself before the voters, ruled that nineteen separate out-of-court declarations by a deceased politician, Michael Hanna, Sr., the principal Commonwealth witness, testifying from the grave, were admissible despite being "arguably in conflict with the guarantees of the Confrontation Clause of the Sixth Amendment." (12-A). Both the trial and appellate courts held that the Petitioner's right to confrontation was satisfied by the cross-examination of living witnesses, who repeated the deceased's hearsay.

In the instant case, the hand of death reaching from the grave permitted to be present at the public trial of the accused not only reaches for Mr. Kerr but also reaches for the Sixth Amendment itself.

STATEMENT OF THE CASE

This case arises from a state court prosecution, brought by the Pennsylvania Attorney General, involving the Petitioner's role as Executive Deputy Auditor General for the Commonwealth of Pennsylvania[1], for the period 1977-1983.

In 1981, information began to surface that various employees of the Auditor General's Department (hereinafter "Department") had paid money in order to be hired.[2] When informed of this, the Auditor General, Al Benedict, initiated an internal investigation, which revealed that a number of individuals had indeed expended various sums of money to affect hiring decisions. The findings of the internal investigation were given to the District Attorney of Allegheny County, since all revelations at that time centered in the Pittsburgh office of the Auditor General.

Shortly thereafter, the Attorney General of Pennsylvania assumed charge of the investigation, and the matter was presented to a multi-county investigating grand jury. Evidence adduced in 1981 and 1982 showed that various individuals had paid cash either to one Nicholas Saittis, an employee of the Auditor General's Pittsburgh office, or to David Peters, who was not a government employee. Testimony indicated that Saittis and Peters transferred this money to Michael Hanna, Sr., Democratic chairman from Washington County, located in Southwestern Pennsylvania, who was also a part-time legal counsel to the Department. Hanna would recommend individuals (who had

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[1] The Auditor General, like the office of Attorney General in Pennsylvania, is a statewide position elected by the voters. The Executive Deputy Auditor General is the second-in-command in that office. Petitioner, was named to that position at the age of 26 in January, 1977, by the newly inaugurated Auditor General Al Benedict.

[2] Hiring in the Auditor General's office was on a non-civil service basis by law

paid money) to the Department's central office in Harrisburg.[3]

Evidence at the trial disclosed that for years Hanna had been able to secure jobs, obtain promotions and arrange raises both at the state and local Washington County government level merely by asking for them. As Democratic Chairman of Washington County, he was accorded the privilege under the patronage tradition in Pennsylvania, of recommending individuals for non-civil service positions.

After the investigation became a matter of public record, Hanna was fired from his position as part-time counsel to the Department, a dismissal he characterized publicly as a difference in opinion as to how much time he should spend in Harrisburg. As investigators for the Attorney General sought to interview or serve and jury subpoenas upon Hanna, they discovered that he was out the Commonwealth, ostensibly on an extended business trip.[4] While absenting himself from Pennsylvania, Hanna had his son, Michael Hanna, Jr. threaten to kill Nicholas Saittis if Saittis would tell the truth about his father, Michael Hanna, Sr. In addition, Michael Hanna, Jr. offered to hire Saittis in a family-run business if he would instead put the blame for the "job sales scandal" on Petitioner rather than his father, Michael Hanna, Sr.[5]

While Hanna was not involved at any point in the job selling conspiracy between Saittis, Peters, and Hanna, Sr., he was

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[3] While not all individuals Hanna recommended were hired, the vast majority were. Later testimony indicated that some individuals who paid money were not, in fact, hired.

[4] At no point did Hanna ever testify under oath, as he was never successfully served with a subpoena for any grand jury appearance and hid from authorities to avoid prosecution, as is discussed, *infra*.

[5] Michael Hanna, Jr. was later charged with obstruction of justice for his part in attempting to influence the testimony of Saittis.

implicated in both the effort to obstruct justice and also with his father in flight to avoid prosecution - an offense he was subsequently charged with. In April, 1982, the Hannas (father and son) were recommended for indictment by the multi-county investigating grand jury, and charges were subsequently filed by the Attorney General against them. They refused to surrender and were at large until their apprehension in Florida by F.B.I. agents in April, 1983. Nine days after being apprehended and transported to Pittsburgh, Pennsylvania, Michael Hanna, Sr. died of a heart attack while incarcerated in the Allegheny County prison.

The record is devoid of any evidence that Michael Hanna, Sr. either admitted to any of the charges against him prior to demise or cooperated with law enforcement officers. In fact, the trial court, in its written opinion (9-A), noted that "the role of Michael Hanna, Sr. will *never be entirely clear* because he died shortly after his arrest and incarceration on similar related charges." (emphasis supplied).

The primary "job-sale scheme"[6] revealed by the evidence involved, as key participants, Michael Hanna, Sr. (hereinafter "Hanna"), Nicholas Saittis and David Peters. Hanna was the long-time Democratic Chairman of Washington County, Pennsylvania. In political circles, he was deemed an extremely powerful county chairman and an essential ally to any Democrat seeking statewide elective office. In May, 1978, Saittis, then the operator of a failing dinner theater, paid Hanna $3,000 for a job in the Department. Saittis commenced employment in August, 1978.

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[6] In addition, Petitioner was also charged with "secondary job sale schemes", involving as co-conspirators John Cotter, Dennis Sabo, and Sanford Aderson. Petitioner was acquitted of all charges involving Cotter; four of the five alleged transactions involving Sabo; but Petitioner was convicted of only the one instance involving Aderson.

Shortly thereafter, at Hanna's suggestion, Saittis became "bagman" for Hanna, selling departmental jobs through the auspices of Hanna and delivering to Hanna himself the great bulk of the proceeds. Between September, 1978 and April, 1981, Saittis received $110,000 in cash for some 28 departmental job placements or job promotions. Of that sum, Saittis kept $20,000 for himself and the balance of $90,000 went to Hanna.

In a typical job-sale scenario, Saittis would either approach or be approached by a job seeker and discuss with him or her the possibility of employment with the Department. Hanna would quote Saittis a price for the job and that figure, quoted by Hanna (and sometimes padded by Saittis), would be communicated through Saittis to the job seeker as either a required fee or campaign contribution. The job prices ranged from a low of $3,000 to a high of $7,500; the price being commensurate with the starting level of the position.

At some point, the job seeker would be furnished with an employment application which Saittis would obtain from Hanna, and which the job seeker would fill out and give to Saittis. Subsequently, Saittis would deliver the application to Hanna along with the cash collected, minus the cut, if any, Saittis kept for himself.

In a manner very similar to that described above, David Peters[7] sold, between December of 1979 and March of 1981, some 13 departmental jobs, through Hanna, for a total of more than $60,000. Of that sum, $50,000 was delivered to Hanna.

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[7] There was testimony that Hanna, Sr.'s criminal conspiracy with Peters commenced in the late 1950's, at a time when Hanna was District Attorney of Washington County - whereby criminal dispositions by that office could be influenced by the payment of cash to him as a designee - and continued through the early 1970's, when jobs allegedly could be purchased in the administration of former Democratic Governor Milton Shapp.

The crux of the prosecution's case against Petitioner,[8] as it later developed, was based upon nineteen claimed out-of-court unsworn declarations of Michael Hanna, Sr.[9] These out-of-court unsworn statements, were introduced into evidence through the testimony of Saittis, Peters, and Hanna, Jr., and were to the effect that the cash received by Hanna from Saittis and Peters for departmental jobs was, in turn, delivered to Petitioner, who obtained those jobs.

Illustrative of such unsworn out-of-court statements permitted by the trial court to be entered into evidence include the following, admitted through the testimony of Michael Hanna, Jr. a non-conspirator:

> 1. (the statement of Hanna, Sr.) that in February, 1977 Benedict and Petitioner offered Hanna "a position with Mr. Benedict's office and they wanted money for the consideration ... three grand ... for a legal position ..." (R.923a, lines 3-25; 924a, lines 1-16);[10]
>
> 2. (the statement of Hanna, Sr. to the effect) that Hanna was being asked to pay the $3,000 for the departmental job "because Mr. Benedict was having financial problems ... and needed to build up like a war chest to repay his debts because he went through this long

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[8] Petitioner's alleged involvement had to do with his position in approving personnel hirings on behalf of the Auditor General and his role in managing the political campaigns of Al Benedict.

[9] In additon to the issue of these unsworn out-of-court declarations (relating to the principal Commonwealth witness, who was deceased at the time of trial), Petitioner, in the state appellate review, objected to eight other instances of hearsay not involving statements by Hanna, Sr. Since they do not relate to Petitioner's constitutional arguments, they will not be here detailed.

[10] References are to the manner of reproducing the record in Pennsylvania appellate practice. The record is on file in the Prothonotary's Office of the Pennsylvania Supreme Court. It is not attached for reasons of judicial economy.

campaign ..." (R.924a, lines 17-25; 925a, lines 1-5);

3. (the statement of Hanna, Sr. to the effect) that Petitioner had told Hanna that Washington County "was being left out of any jobs with the [department]" because "[Hanna] had been sending in applications without any [money]" R.928a, lines 10-15; 929a, lines 1-18;

4. (the statement of Hanna, Sr.) that when Hanna offered the cash for his job to Benedict, Benedict said "no, please give it to John [Kerr] ... he handles those matters" (R.930a, lines 2-11);

5. (the statement of Hanna, Sr.) that when Hanna went to give money and job applications to Benedict at his (Benedict's) office, Benedict said "no, go over and give it to John, he handles that situation" (R.939a, lines 3-9; 968a, lines 14-25; 969a, lines 1-6);

6. (the statement of Hanna, Sr.) that "the money that was being collected in relationship to any jobs was going ... [to Mr. Kerr]", including the money Saittis gave Hanna for Saittis' job (R.932a, lines 15-25; R.933a, lines 1-7);

7. (the statement of Hanna, Sr.) that Hanna "wasn't going to give any more money out because he was stuck in the middle to the extent that he had already promised the jobs ... and nothing was happening ... [and knew he was] going to get hit up for coin" (R.945a, lines 12-25; 946a, lines 8-15);

8. (the statement of Hanna, Sr.) that Hanna kept only between $4,000 and $8,000 of the job-sale monies collected through him (R.955a, lines 18-25; 956a, lines 1-5);

9. (the statement of Hanna, Sr. to the effect) that Hanna was willing to turn the bulk of the job-sale money over to someone else because Hanna "wanted to make ... Benedict governor, and to achieve cabinet position. That was the overall goal" (R.956a, lines 6-14);

The remaining Hanna, Sr. out-of-court declarations were admitted through the testimony of two conspirators, Nicholas Saittis and David Peters. Specifically they include:

1. (the statement of Hanna, Sr.)[admitted through Saittis' testimony] that departmental "jobs could be obtained through Mr. John Kerr. He was the boss man." (R.361a);

2. (the statement of Hanna, Sr.)[admitted through Saittis' testimony] that Hanna "purchased his own job for three thousand ... [and] paid Mr. John Kerr [for that job]" (R.362a);

3. (the statement of Hanna, Sr. [admitted through Saittis' testimony] to the effect) that the money Saittis collected from the job sales and delivered to Hanna was thereafter "turned ... in [by Hanna] to John Kerr" (R.368a-371a);

4. (the statement of Hanna, Sr.)[admitted through Saittis' testimony] that "there was applications and money [sic] ... for jobs" in the sealed packages, or envelopes, that Hanna said Saittis delivered to Petitioner (R.366a, lines 13-19; 406a, lines 3-12; R.416a, 477a);

5. (the statement of Hanna, Sr.)[admitted through Saittis' testimony] that Hanna and "John Kerr get together" and set prices for the [departmental] jobs sold by Saittis (R.372a, lines 1-7);

6. (the statement of Michael Hanna [admitted through the testimony of Nick Saittis] to the effect) that it was Petitioner whom Hanna telephoned about jobs when Saittis delivered job-sale money to Hanna (R.411a, lines 2-12);

7. (the statement of Hanna, Sr. [admitted through Peters' testimony] to the effect) that it was Petitioner "who permitted or allowed him to have [the job purchasers secured through Peters] placed in government positions" (R.605a, line 25; 606a, lines 1-9);

8. (the statement of Hanna, Sr. [admitted through Peters' testimony] to the effect that the monies Peters obtained from the job sales and delivered to Hanna were "turned over [by Hanna] to Mr. Kerr" (R.618a, lines 4-7);

9. (the statement of Hanna, Sr.) [admitted through Peters' testimony] to the effect) that envelopes that Peters saw Hanna deliver to Petitioner contained money, apparently from job sales (R.610a-611a).

10. (the statement of Hanna, Sr. [admitted through Peters' testimony] to the effect) that it was Petitioner who Hanna telephoned when Peters delivered applications and job-sale money to Hanna (R.620a, lines 5-20);

HOW THE FEDERAL QUESTION WAS PRESENTED

Trial counsel objected to some, but certainly not all, of the foregoing statements. In fact, counsel, at the time of filing pre-trial motions, had filed a motion in limine seeking to determine the admissibility of statements made by Michael Hanna, Sr., due to the fact that these very statements had not been made "in furtherance of the alleged conspiracy." (R.101a). At the pre-trial hearing, defense counsel withdrew this motion saying "we should reserve that particular motion until the trial commences and then make the objections at the appropriate time." (R.138a, lines 15-17). The Court responded, "I do think it is proper for us to wait until such time as the testimony is introduced in order to make a ruling because there certainly would be some factual basis on which the Court would have to base its opinion or its decision on." (R.139a, lines 3-7).

In post-trial motions, defense counsel raised the issue that "the Court erred in admitting inadmissible hearsay which was prejudicial to the defendant." (R.113a). The right to confrontation of Michael Hanna's unsworn out-of-court statements was not specifically mentioned. Nevertheless, despite not being specifically raised, the trial court wrote (13-A) that "the defendant's right to confront his accusers, including but hardly limited, to Mr. Hanna, was adequately preserved under the Constitutional provisions." It noted:

> ... the witnesses who testified as to Michael Hanna, Sr.'s declarations of John Kerr's criminal involvement in the job selling operation were under oath, subject to cross examination, and their demeanor was observed by the jury, who could evaluate the reliability of information which they all claimed to have heard. See *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970). (13-A)[11]

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[11] This Court has held, *Orr v. Orr*, 440 U.S. 268, 274-75 (1979), that the elementary rule [is] that it is irrelevant to inquire... when a Federal question

Petitioner retained new counsel for purposes of appeal through the state appellate court system. New counsel specifically raised the federal constitutional issue in his briefs before the Pennsylvania Superior and Supreme Court.[12] On the Sixth Amendment issue, the Superior Court majority memorandum opinion noted that the trial court's opinion was "that appellant's Sixth Amendment rights had not been violated." (4-A). (Citations omitted). In addition, the majority opinion indicates "Our review of the record has provided us with no basis on which to disagree with the trial court's assessment." (4-A).

In post-verdict motions for a new trial or in arrest of judgment, trial counsel's principal contention was as follows:

> ... the amalgamation of the profuse and repeated admissions of hearsay testimony by Commonwealth witnesses in violation of recognized rules of evidence severely prejudiced the defendant and deprived him of a fair trial. (10-A).

The decision of the trial court on this issue was based upon the following four conclusions of law:

1. the evidence was properly admitted under the co-conspirator exception to the rule against hearsay;

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was raised in a court below when it appears that such question was actually considered and decided." (Citations omitted). Therefore, the fact that the federal constitutional issue was considered and resolved by the trial court below means that the issue was preserved for consideration by this Court.

[12] Pennsylvania appellate courts have held, *Commonwealth v. Basile*, 312 Pa. Super. 206, 458 A.2d 587, 591 (1983), that a confrontation clause issue must be specifically raised in either initial or supplemental post-trial motions and that objected-to hearsay must be individually and specifically detailed. *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234, 240-41 (1982). For that reason, appellate counsel raised the issue of trial counsel's ineffectiveness, in order to properly preserve the constitutional issues for subsequent review. Like the trial court, the appellate court addressed the merits of the constitutional claims, preserving them for review by this Court.

2. because Michael Hanna, Sr. was unavailable in his grave and due to the fact that the alleged agreements were made orally and the consideration was cash, the hearsay testimony becomes necessary to evaluate the relative culpability of the alleged conspirators. (12-A);

3. those repeating Hanna's out-of-court declarations were under oath, subject to cross-examination, and their demeanor was observed by the jury, who could evaluate the reliability of information they *all* claimed to have heard. See *Dutton vs. Evans*, 400 U.S. 74, 88-89 (1970). (13-A);

4. Similarly incriminating testimony was offered by several witnesses.

A panel of three Judges of the Pennsylvania Superior Court heard the intermediate appeal of Petitioner and issued both a majority opinion and a dissenting statement, in which the federal constitutional issue heretofore raised was alluded to in the former, and specifically addressed in the latter. The majority could only say that "our review of the record has provided us with no basis on which to disagree with the trial court's assessment," (4-A) commenting by footnote as follows:

> ... [h]owever, these are problems endemic to every hearsay exception, and are, theoretically at least, overcome or vitiated by the reliability in which they occur. The co-conspirator exception, which has been observed to be 'the most frequently used exception to the hearsay rule,' *United States v. Inadi*, 106 S.Ct. 1121, 1128 (1986), is no different in this regard. (4-A).

The Dissenting Statement initially noted that "Michael Hanna, Sr. had been, until the time of this death, the foundation of the case of the prosecution. The Commonwealth was not to be thwarted by the Almighty, however ... ." The dissenting Judge's

interpretation of the relevant state and federal law was as follows:

1. the bulk of the Hanna unsworn out-of-court declarations concerning Petitioner "were gratuitous and without connection or relevance to - let along in furtherance of - conspiracy" (7-A), thus outside the ambit of the co-conspirator exception to the hearsay rule.

2. that the admission of the above-cited declarations were unconstitutional:

> *The fact is that the principal Commonwealth witness testified from the grave* through his son, through Nick Saittis and through David Peters. *The Commonwealth* was thereby able to present to the jury uncorroborated, unverifiable testimony that *stripped appellant of the cloak of innocence - without confrontation by appellant of his accuser, without cross-examination of the primary source of the evidence*, and, what is fundamentally important for the purpose of this appeal, without challenge by trial counsel. (emphasis supplied by Petitioner). (7-A).

REASONS FOR GRANTING THE WRIT

I. The Case Presents Important Questions of Constitutional Significance ot Yet Settled by This Court

The extent of a defendant's right "to be confronted with the witnesses against him," guaranteed by the Sixth Amendment and made obligatory on the states by the Fourteenth Amendment," *Pointer v. Texas*, 380 U.S. 400, 403 (1965), is strained by the Pennsylvania trial and Superior Court [appellate] interpretation permitting the use of numerous and totally unconfronted statements from the grave of a notorious dead man to prove guilt.

Pennsylvania's appellate courts, *Commonwealth v. Meholic*, 341 Pa. Super, 342, 491 A.2d 848, 850 (1985), have interpreted *Dutton v. Evans*, 400 U.S. 74, 88 (1970) to mean that no right to confrontation exists where the declarant's words are repeated in court by a third person subject to cross-examination. Such an interpretation, of course, vitiates the Sixth Amendment, since it is the very statements of the out-of-court declarant which are being used to prove guilt; and are most in need of cross-examination, rather than those of the third party, who cannot testify as to the truth of the declarant's statements.

This Court has, heretofore, ruled that "the testimony from the grave" will only be permitted in cases involving dying declarations[13] or prior recorded testimony. *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) ("Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of

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[13] A "dying declaration" is not here involved. Hanna, Sr. did not make any of the statements, admitted into evidence at Petitioner's trial, knowing of his impending death, or while lying at the point of death. Such declarations are generally limited to the homicide of the declarant. *Mattox v. United States*, 146 U.S. 140, 151 (1892).

witnesses who have died since the former trial.") *Mattox v. United States*, 156 U.S. 237, 241 (1895) (deceased's prior testimony under oath and subject to cross-examination).

The decision of the Pennsylvania courts, if permitted to stand, would make meaningless the guarantee of the Confrontation Clause and would extend the exceptions to the Clause's literal words in an unprecedented manner, representing a return to the *ex parte* affidavits of Sir Walter Raleigh's time, "condemned on the deposition of an alleged accomplice who had since recanted." *United States v. Inadi*, ____ U.S. ____, 106 S. Ct. 1121, 1135 (1986). Whether the Confrontation Clause is to retain any vitality today is a critically important constitutional question for this Court to address.

Reviewing the facts of this case, it is clear that Hanna, Sr.'s statements, admitted to prove Petitioner's guilt, represent neither prior recorded testimony nor dying declarations. There was no way for Hanna, Jr., Saittis, nor Peters to know the accuracy of Hanna, Sr.'s declarations. Therefore, the opportunity to cross-examine these third parties, in reality, was meaningless and resulted in no confrontation at all. Once Hanna, Sr.'s testimony was admitted, the trial was effectively over, because Petitioner had no way to cross-examine the dead man's testimony or to challenge his word. The hearsay's impact was "devastating", within the meaning of *Dutton v. Evans, supra.*, and could not possibly be overcome.

While a literal reading of the Confrontation Clause - that is, that a defendant has a fundamental right to face his accuser in court and to cross-examine him - stood the test of time, subject only to the exceptions of dying declarations and prior recorded testimony, the law has become unsettled in the wake of *Dutton v. Evans, supra.* and recent pronouncements. The meaning of the Confrontation Clause and its practical application is in need of clarification.

This Court has itself acknowledged, *Ohio v. Roberts* 448 U.S. 63, 100 S.Ct. 253 (1980), that if the language of the Confrontation Clause were to be read literally, "it would require, on objection, the exclusion of any statement made by a declarant not present at trial." 100 S.Ct. at 2357. This the Court stated, "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme."[14] *Id.*

While not interpreting the Confrontation Clause literally this Court "has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.'" *Ohio v. Roberts, supra.* 100 S.Ct. at 2537, quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). The mission of the Clause has been held "to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the 'trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton v. Evans, supra. 400 U.S. at 89, quoting California v. Green, supra.*, 399

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[14] Nevertheless, this Court has consistently maintained that it is not constitutionalizing the exceptions to the hearsay rule, which is a problem of evidence (reliability), not constitutional law. "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." *California v. Green*, 399 U.S. 149, 155-56 (1970). Thus the Court continues to claim that it is not "map(ping) out a theory of the Confrontation Clause that would determine the validity of all such hearsay exceptions permitting the introduction of an absent declarant's statements." *Id.* at 162. That is why a recognized hearsay exception may still violate the Confrontation Clause. *Dutton v. Evans, supra.*, 400 U.S. at 82. ("A hearsay statement admissible under a firmly rooted excpetion to the hearsay rule may nevertheless violate the confrontation clause.")

U.S. at 161.[15]

Only last year, in *Lee v. Illinois*, ____ U.S. ____, 106 S.Ct. 2056 (1986), Justice Brennan noted that "the right to confront and cross examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Id.* at 2062. He stated that "[t]he right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Id.* He referred to this process as the "truthfinding function of the confrontation clause" and found that the admission of an accomplice's confession was presumptively unreliable and did not bear sufficient 'indicia of reliability' to overcome that presumption. *Id.* at 2061. Thus, where an accomplice's hearsay confession is concerned, to overcome Confrontation Clause concerns, the statement must bear sufficient independent "indicia of reliability", as that term was detailed in *Dutton v. Evans*, *supra*.

Paradoxically, this same analysis has not been applied to the statements of a co-conspirator, although at least one circuit has suggested, in the identical federal context, that "the question of the reliability of co-conspirator statements is of constitutional significance in its own right." *United States v. Pecora*, 798 F.2d 614, 627 (3rd Cir. 1986). Two questions immediately arise: is the statement of a non-testifying, co-conspirator a violation itself of the Confrontation Clause; and, second, must such statement (if permitted to be admitted in the first instance) be shown to have

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[15] Such statements, of course, gravitate against the development of a distinction between state hearsay rules (reliability of evidence) and the Confrontation Clause (fundamental right to fairness), making the law unsettled. This is because hearsay exceptions relate to rules of evidence, which seek to admit only evidence which is truthful and reliable. The Confrontation Clause, on the other hand, implicates fundamental rights of fairness guaranteed by the Bill of Rights. The distinction between the two is in need of clarifcation.

particularized "indicia of reliability."[16]

These general principles, at times conflicting, must be reconciled with the state hearsay exception for co-conspirator statements. This is because the statements "from the grave" implicating Petitioner ostensibly were admitted under the co-conspirator exception to the hearsay rule.[17] There is logically no reason to treat statements of a non-testifying co-conspirator any differently from the statement (confession) of an accomplice, held to be presumptively unreliable in *Lee v. Illinois, supra.*, decided only last year. The Third Circuit has recently characterized co-conspirator statements as follows:

> Coconspirator statements do not possess the special trustworthiness characteristic of evidence falling within "a firmly rooted hearsay exception." (Citations omitted). They are instead admitted because of "the legal fiction that each conspirator is an agent of the other and that statements of one can therefore be attributable to all." (Citations omitted). Thus the Confrontation Clause requires a showing of reliability in addition to the requirements set forth in FRE 801(d)(2)(E).
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> *United States v. Pecora, supra.*, 798 F.2d at 628.

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[16] Justice Marshall has observed, *United States v. Inadi, supra.*, 106 S.Ct. at 1129, n.1 (1986), that the conflict among the lower courts "as to whether declarations of co-conspirators who are not present in court for cross-examination must be shown to have particularized 'indicia of reliability' before they can be admitted for substantive purposes against a criminal defendant" is unresolved and, presumably, merits this Court's consideration.

[17] The Pennsylvania Superior Court dissent of Judge McEwen (7-A) observes that "the bulk of the statements regarding Mr. Kerr... were gratuitous and without connection or relevance to - let alone in furtherance of - the alleged conspiracy." The statements, therefore, may *not* have been admissible as an exception to the hearsay rule.

Several important points are evident from the cited passage. First, statements of co-conspirators, like those of accomplices, are not necessarily presumptively reliable, and the Confrontation Clause may require a "particularized showing of indicia of reliability."[18] Second, not all courts agree that the statements of a co-conspirator may be characterized as "a firmly rooted hearsay exception," *Ohio v. Roberts, supra.*, 100 S.Ct. at 2539.[19] It is also important to note in this context that Federal Rule of Evidence 801(d)(2)(E) is virtually identical to the state co-conspirator exception cited by the courts below.

Clearly, this case presents important constitutional questions which are in need of being resolved. Principal among these is whether *Dutton's* "indicia of reliability" test must be applied to declarations of co-conspirators.[20] Another is whether this Court will countenance "testimony from the grave" to prove guilt involving neither a dying declaration nor prior recorded testimony. Yet another concerns the overlap between state hearsay rules and the Confrontation Clause: is the co-conspirator exception to be given status as "firmly rooted" and determined to be presumptively reliable. Petitioner submits that the rationale underlying *Lee v. Illinois* should be extended to co-conspirator statements, especially as in this case where their impact is "devastating."

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[18] Justice Marshall has pointed out (see n.16 *supra*) the conflict among the Circuits as to whether the Confrontation Clause requires a showing of particularized "indicia of reliability" when statements of co-conspirators are at issue. *United States v. Inadi, supra.*, 106 S.Ct. at 1129, n.1, citing the following cases: *United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985); *United States v. Ordoney*, 722 F.2d 530, 535 (9th Cir. 1983); *United States v. Perez*, 702 F.2d 33 (2d Cir. 1983); *Boone v. Marshall*, 760 F.2d 117, 119 (6th Cir. 1985).

[19] In *Roberts*, this Court specifically accepted as "firmly rooted" only dying declarations, prior trial testimony, and the business and public records exceptions. 100 S.Ct. at 2539, n.8.

II. Application of *Dutton's* "Indicia of reliability" Test Demonstrates that the Testimony from the Grave Was Improperly Admitted

In affirming the judgment of sentence, the Superior Court panel majority has ignored the standards employed in *Dutton v. Evans, supra.*, for measuring compliance with constitutional requirements determinative of "whether a statement may be placed before the jury though there is no confrontation of the declarant." *Id.*, 400 U.S. at 89.

Unlike in *Dutton*, most of the instant declarations *did* contain "an express assertion about past fact" that unambiguously established Petitioner's active participation in crimes charged. Virtually all of Hanna, Sr.'s declarations were to that effect. Hence, there was a real danger that the jury would give the challenged statements "undue weight." *Dutton v. Evans, supra.*, 400 U.S. at 88. Also, unlike in *Dutton*, Petitioner was not in the presence of the out-of-court declarant at the time that any of the declarations were made and few, any, of the statements could be deemed spontaneous. Rather, the most damaging statements were made with ample time for calculating reflection.

And the circumstances under which many of the instant declarations were made did *not* "give reason to suppose that [the declarant] did not misrepresent [Petitioner's] involvement in the crime(s)." *Id.* 400 U.S. at 89. In fact, they appear to have been made simply to *interject* Petitioner's name and, thus, prejudically *connect* Petitioner therewith. Moreover, the evidence suggested that Hanna, Sr. had his own selfish reason for "putting it on" Petitioner. And, since virtually all of the persons to whom Hanna, Sr. made his statements already knew of Hanna's criminal involvement and/or were themselves involved with him in the job-selling, his statements implicating Petitioner can scarcely be said to have been reliable because such statements would have been against his "penal interest" when made.

Further militating against the reliability of the challenged hearsay is the very fact that many of the declarations - especially those made by Hanna to his son - merely implicated Petitioner in the alleged conspiracy without having any apparent tendency to advance its common objectives. Additionally, the panel majority failed to recognize that, unlike in *Dutton*, the unconfronted declarations was not a single, isolated statement of "peripheral significance" and of ambiguous import, but to the contrary, included numerous declarations "directly implicat[ing] John Kerr in the job selling conspiracy charged" (12-A) and constituted the very heart of the Commonwealth's case against him.[21]

III. A Pennsylvania Common Law Rule of Evidence Allowing the Admission of Testimony of a Dead Man Cannot Be Substituted for the Prosecution's Modest Duty to Confront the Accused with his Accusers at Public Trial [or Constitutionally Recognized Substitute] Pursuant to the Sixth Amendment of the Constitution of the United States as Applied to the Respective States Via the Fourteenth Amendment.

The Sixth Amendment Confrontation Clause appears to have been silent these past 100 years; although silent, it is not yet dead.

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[20] The Commonwealth of Pennsylvania has argued below that the co-conspirator exception to the hearsay rule, under *Roberts*, without anything else, satisfies the Confrontation Clause. (Brief of Commonwealth Before the Superior Court, pp. 30-31.)

[21] That the challenged hearsay was so "devastating" to the defense and so "crucial" to the prosecution argues forcefully against any assertion that its admission constituted harmless error. It is far from clear beyond a reasonable doubt that the improperly admitted hearsay, directly implicating Petitioner in the offenses charged against him, could not have contributed to the verdict. *Chapman v. California*, 386 U.S. 18 (1967).

Even little children understand that there is a difference between what a childhood foe will say to another and what that same childhood foe would say to them - face-to-face - in their presence. This latter phenomenon is the very spirit of the Sixth Amendment Confrontation Clause. Whether a witness against the accused would in fact make the same accusatory statements in the presence of the accused himself. It is this simple right [or correlative duty upon the Prosecution] which the specific Confrontation Clause of the Sixth Amendment affords to the accused. This right of the accused or correlative duty upon the Prosecution, must be addressed initially and certainly before the second more general question of due process. It must be remembered that all the specific Amendments in the Bill of Rights have their own independent identities, which exist apart from the general due process issue; otherwise, there would be only a need for two Amendments in the Bill of Rights, the Fourteenth, reduced to the Due Process Clause - as applied to the states, and the Fifth Amendment, reduced to its Due Process Clause - as applied to the single federal system.

It is a question of seeing the "particular trees" upon the background of the "forest"; seeing the particular Amendments upon a background of the general due process standard. The specific expressions are not the same as the general standard. In the context of timeframe, the specific amendments must always be the forerunner issues to be addressed initially; subsequent thereto, the ultimate more general comprehensive due process issue can addressed. If any of the specific amendments are not addressed first; we shall lose sight of them because they will be subsumed into the larger due process question as quickly as an optical illusion plays upon one's sense of sight. One must always "put the horse before the cart";

address the specific amendment, first, in our case the Sixth Amendment, then the Fourteenth Amendment due process aspect. First, Was the accused "confronted with the witnesses against him?" - the empirically observable phenomenon, Gestalt in nature (beyond the mere observance of the demeanor of the witness), wherein the court or other fact-finder has the opportunity to review whether the principal witnesses of the Prosecution do in fact make statements [accusatory in nature] which provide material support for the Prosecution's case. This is the Sixth Amendment question. The second separate question - usually immediate - is whether the accused was afforded the evidentiary opportunity of cross-examination of the Prosecution's witness. This subsequent second evidentiary issue, of course, must always be evaluated against the general standard of what is due process. That issue, however, is not the Sixth Amendment question.

In the instant case, Petitioner Kerr was not afforded the opportunity to be present with the principal witness against him; obviously because Michael Hanna, Sr., the principal witness, was dead. However, for the Prosecution to avoid the true Sixth Amendment question by responding that Mr. Kerr had a right to cross-examine the hearsay witnesses of alleged Michael Hanna, Sr. statements, is absurd because it is one step removed from the due process question of whether Mr. Kerr had the right to cross-examine Michael Hanna, Sr. The Prosecution, in its response, adroitly avoids entirely the threshold Sixth Amendment question and avoids even the due process question as indicated in the latter portion of the preceding sentence - by directing the trial and appellate court's attention to the flawed evidentiary issue, i.e. cross-examination of hearsay witnesses.

The Prosecution, the Commonwealth of Pennsylvania, would have this Court believe that to have the accused confronted with their principal Prosecution witnesses in open court (or constitutionally acceptable substitute for open court) - called for the limited purpose of direct examination by the Prosecution itself - would be too onerous a burden. Although it may be problematic, it is certainly not to onerous. That the letter of the specific Sixth Amendment cannot always prevail is understandable; Petitioner Kerr asks merely that its spirit be preserved. How the spirit of the Sixth Amendment is to be applied in the context of a fair trial is, of course, the logical subsequent constitutional question; not the threshold specific constitutional question. For example. Whether the Prosecution must present its witnesses in the presence of the accused at the trial, itself, or at a constitutionally acceptable substitute - such as: 1) a video tape of the Prosecution's direct examination of their own principal witness(es) in the presence of the accused (permanently preserved for the trier of fact at trial), or 2) the use of electronic video tele-conference from the location where both the accused and the accusor are present for the Prosecution's direct examination. That the Prosecution has the burden of producing its principal witnesses to testify in the presence of the accused within the time constitutionally required for a speedy trial is less burdensome today - with such available high speed transportation, electronic video tele-conferencing and eletronic videotape recordations - than it was at the time of the framing of the Bill of Rights. It goes without saying that in our specific form of republican democracy, the State, most appropriately, has the burden of proof in all

cases where an individual has been accused of crime; this "confrontation" duty of the Sixth Amendment is but a modest burden to the State.

An examination of the following hypothetical will illustrate the point more clearly: Assume, that in the instant case, the Prosecution had presented its principal witness Michael Hanna, Sr. [either at the jury trial itself or with the court's approval at a constitutionally acceptable substitute for same such as an electronic teleconference or an electronic videotape]. Upon completion of the Commonwealth's direct examination of Michael Hanna, Sr. in the presence of Mr. Kerr, the Commonwealth's Sixth Amendment Confrontation Clause duty would have been completed. To this point, the fact-finder has had the opportunity to observe not only the demeanor of the accuser but also whether, in fact Mr. Kerr has been accused of anything at all based upon the testimony of the accuser.[22] Continuing with the hypothetical, at this point of the criminal procedure, if Mr. Michael Hanna, Sr. a) would have died on the witness stand, b) had become incompetent, or c) had run out of the court room, never to be heard from again; such aforesaid hypothetical factual scenarios, a), b) and c), do not call into play the Sixth Amendment Confrontation issue, but again are germane only to the subsequent second question which would be whether Mr. Kerr was afforded the opportunity to cross-examine Michael Hanna, Sr. - a due process question.

Apropos the instant case is Sir Walter Raleigh's famous demand for confrontation as quoted in the

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[22] The Commonwealth may be confused on this point. The State (or Commonwealth) is Not the Accuser; it is the Prosecutor.

following Article "The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One".[23]

> The proof the Common Law is by witness and jury; let Cobham be here, let him speak it. Call my accuser before my face, and I have done.

Raleigh's remark addresses this phenomenon of empirically observable relationship between the accused and his accuser - a Gestalt phenomenon in which the "whole is greater than the sum of the respective parts". This phenomenon, which is understandable by all children remains unremembered by this Court these past 100 years. It is important to note that the record does not indicate a demand for cross-examination of Cobham; merely that Cobham be present before the jury and see if he speaks the accusations before Raleighs face. Finally, Professor Graham alludes to the trial - which ultimately Sir Walter Raleigh lost - with the following cogent rhetorical remark:

> Of course this sort of political prosecution could not occur in this country today. *Or could it?* (emphasis supplied by counsel).

In addition, and in conclusion to the foregoing, it should be

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[23] Criminal Law Bulletin, Vol. 8, No. 2, p.100 by Kenneth W. Graham, Jr., Professor of Law, University of California, Los Angeles.

[24] Criminal Law Bulletin, Vol. 8, No. 2, p.101 by Kenneth W. Graham, Jr., Professor of Law, University of California, Los Angeles.

noted that the resolution of the instant case by the Pennsylvania Superior Court below in a manner adverse to the accused - with denial of allocatur by the Supreme Court of Pennsylvania - is indicative of the recent line of Pennsylvania decisions wherein the Supreme Court has declined to afford to its residents the long recognized higher minimal Pennsylvania Constitutional standards than those afforded, at minimum, by the United States Constitution. That this concern runs deep can be seen in Justice Zappala's dissenting opinion in the recent case of *Commonwealth v. Pierce*, ____ Pa. ____ (1987) [decision not yet reported; copy of relevant pages of Opinion attached in Appendix] wherein Justice Zappala states in material part as follows:

> ... the majorty's great haste to cast off the independent rights we have conferred upon the citizens of this Commonwealth in exchange for the simplicity of becoming homogeneous with the U.S. Supreme Court...

Justice Zappala continues in a plea to the majority in respectfully pointing out the following:

> "The majority once again seizes upon the public clamor to walk in lockstep with our federal brethren ... we have once again abandoned our coveted position of being a leader among this nation's judiciary and relegate to a position of one 'follower of federalism'.

If Pennsylvania is no longer to be a leader in matters of state constitutional (Commonwealth) decisions in its own interpretation of its Pennsylvania Constitution, we ask this highest of federal courts to remind Pennsylvania through this decision that Pennsylvania, along with the other states and the federal judicial system must be a follower of the minimal Sixth Amendment standards required by the United States Constitution as pronounced by this Court whether they be as applied to the respective states vis-a-vis the Fourteenth Article of Amendment

to the United States Constitution or directly to the federal courts vis-a-vis this Court's interpretation of the Sixth Amendment.

In the instant case, the hand of death - "Mort Main" - reaching from the grave, permitted to be present at the public trial of the accused, not only reaches for Mr. Kerr but also reaches for the Sixth Amendment itself.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should be issued to review the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF PENNSYLVANIA

vs.

IN THE SUPERIOR COURT OF PENNSYLVANIA

JOHN M. KERR, Appellant

No. 00218 Harrisburg 1985

Appeal from the Judgment of Sentence of the Court of Common Pleas of Dauphin County, Criminal, at No. 121 Criminal 1984.

BEFORE: McEWEN, MONTEMURO and CERCONE, JJ.

MEMORANDUM: FILED: SEPTEMBER 8, 1986

This appeal lies from judgment of sentence imposed following appellant's conviction for multiple offenses[1] connected with his activities as the pivotal figure in a job-selling scheme involving the office of the Pennsylvania Auditor General. Sentence imposed was 2 to 5 years imprisonment, and a $50 fine on each count of the conviction. Post trial motions filed by trial counsel were abandoned when appellate counsel assumed stewardship of the case. We are now presented[2] with one major issue, that of trial counsel's ineffectiveness, couched in terms of three alleged errors: (1) Failure to persist in a request for severance; (2) failure to object to hearsay; (3) failure to object to some jury instruction, and to request certain others.

We begin our discussion by reiterating the principal that to prevail upon the question of counsel's effectiveness, appellant

must demonstrate not only representational inadequacies such as would satisfy the standard set by *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967), but also prejudice accruing therefrom such as would undermine the integrity of the verdict. *Commonwealth v. Pierce*, ____ Pa. Super.____, 498 A.2d 423 (1985); *Commonwealth v. Garvin*, 335 Pa. Super. 560, 485 A.2d 36 (1984). The necessary first step is an evaluation of the merits of each claim. *Commonwealth v. Clemmons*, 505 Pa. 356, 479 A.2d 955 (1984).

Appellant claims that counsel's failure to pursue a severance motion (filed and withdrawn pre-trial) eventuated in prejudice fatal to the presentation of his defense. It is contended that the 219 counts in the information were improperly charged together as they represented four separate conspiracies; that denial of a severance motion would have been, *a priori*, trial error because the "independent admissibility" test of Pa. R.Crim.P. 228(a)[3] was not satisfied; that, by failing to maintain the severance motion, counsel demonstrated the absence of a basis for his action designed to effectuate his client's interests. *Maroney, supra.*

First, appellant's insistence on the absolute disjunction of the various schemes charged is not persuasive. The inescapable fact remains that however complex the resulting pattern, only one tapestry was woven, and appellant operated the loom. That the component threads were easily distinguishable from extraneous ones is obvious from the jury's finding of guilt on only 139 of the 219 counts charged.

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[1] Specifically, appellant was found guilty of 139 counts of bribery, violations of the Conflict of Interest Act, demanding property to secure employment, obstruction of the administration of law, criminal attempt, and conspiracy.

[2] We note with disapproval that appellant is in violation of Pa. R.A.P. 2135, which limits briefs to 50 pages except where permission has been obtained to exceed that length.

Further, in denying the existence of a "significant factual nexus" between and among criminal operations, appellant advances an argument which is at best factitious. Since he himself as prime mover, provides and constitutes such a connective, the design becomes common, and the scheme overall. Thus are met the requirements of both Rule 228, and those cases which allow exceptions to the inadmissibility of 'other crimes' evidence. *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981), *Commonwealth v. Slyman*, 334 Pa. Super. 415, 483 A.2d 519 (1984).

As the offenses were properly joined in the information, and the severance motion doomed to failure, counsel cannot be labeled derelict in his duty for having bowed to the inevitable. *Commonwealth Larkins*, 340 Pa. Super. 46, 489 A.2d 837 (1985) (counsel not required to perform a fruitless act).

It is next claimed that counsel's representation was inadequate in that he failed to object often enough to the admission of hearsay. In responding to the cognate assignment of error raised in post trial motions, that is, that such hearsay, it was properly admissible under the "co-conspirator exception" to the hearsay rule, *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981); *Commonwealth v. Pinkins*, 343 Pa. Super 44, 493 A.2d 1365 (1985); that a proper foundation has been laid for its

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[3] Rule 228. Joinder of Offenses and Defendants in Information

(a) Two or more offenses, of any grade may be charged in the same information if

(1) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or

(2) the offenses charged are based on the same act or transaction.

There shall be a separate count for each offense charged.

introduction, *Commonwealth v. Kersten*, 333 Pa. Super. 343, 482 A.2d 600 (1984); *Commonwealth v. Basile*, 312 Pa. Super. 206, 458 A.2d 587 (1983); that appellant's conviction was not based solely on second-hand testimony; and, finally, that appellant's Sixth Amendment rights had not been violated. *Dutton v. Evans*, 400 U.S. 74 (1970); *Commonwealth v. Meholic*, 341 Pa. Super. 342, 491 A.2d 848 (1985). Our review of the record has provided us with no basis on which to disagree with the trial court's assessment. Even had counsel failed to enter any objections to the material complained of, appellant would not now be found to have been poorly represented.[4]

The third area of allegedly demonstrable ineffectiveness of counsel is in regard to the court's charge. Appellant claims to have been denied a fair trial because of counsel's failure to object to some portions of the jury instructions, and his failure to request certain specific points for charge.

Our responsibility with respect to claims of error in jury instructions is to determine whether the charge read as a whole "fairly guided" the jury in its deliberations. *Commonwealth v. Rodriguez*, 343 Pa. Super. 486, 495 A.2d 569, 573 (1985). We find

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[4] In his thoughful dissent, Judge McEwen expresses the very real concern that the Commonwealth is "able to present to the jury uncorroborated, unverifiable testimony that stripped appellant of the cloak of innocense - without confrontation by appellant of his accuser, without cross-examination of the primary source of the evidence, and, what is fundamentally important for the purpose of this appeal, without challenge by trial counsel." (Dissenting Opinion at 2).

However, these are problems endemic to every hearsay exception, and are, theoretically at least, overcome or vitiated by the reliability of the context in which they occur. The co-conspirator exception, which has been observed to be "the most frequently used exception to the hearsay rule," *United States v. Inadi*, 106 S.Ct. 1121, 1128 (1986), is no different in this regard.

that they were so guided in this instance, and that, as a result, counsel cannot be faulted.

Since none of the instances recited constitutes reversible error, we affirm the judgment of the lower court. Judgment of sentence affirmed.

McEwen, J. FILES A DISSENTING STATEMENT.

COMMONWEALTH OF PENNSYLVANIA

vs.

IN THE SUPERIOR COURT OF PENNSYLVANIA

JOHN M. KERR, Appellant No. 00218 Harrisburg 1985

Appeal from the Judgment of Sentence of the Court of Common Pleas of Dauphin County, Criminal, at No. 121 Criminal 1984.

BEFORE: McEWEN, MONTEMURO and CERCONE, JJ.

DISSENTING STATEMENT BY McEWEN, J.
FILED: SEPTEMBER 8, 1986

As is to be expected from two of the most distinguished members of this Court, the expression of the view of the majority reflects n of the record and a studious presentation of position. I am, ationonetheless, compelled to, very respectfully, dissent because my study of the record leads me to conclude that the prosecution secured this conviction through inadmissible hearsay testimony.

To be sure, Michael Hanna, Sr., had been, until the time of his death, the foundation of the case of the prosecution. The Commonwealth was not to be thwarted by the Almighty, however, since the prosecution, to its credit in our system of advocacy, proceeded to present, in the hearsay testimony of Michael Hanna, Jr., the principal portion of the very damaging testimony that would have been provided by his father - without, however, exposure to the perils that cross-examination of

Michael Hanna, Sr. would have presented to the cause of the Commonwealth.

The Commonwealth asserts this hearsay evidence was admissible pursuant to the co-conspirator exception to the hearsay rule and that counsel for Mr. Kerr cannot be deemed ineffective for failing to raise a baseless claim. Our study of the record requires the conclusion that, while certain of that testimony was admissible as within that exception, the bulk of the statements regarding Mr. Kerr, allegedly made by Michael Hanna, Sr. to his son, were gratuitous and without connection or relevance to - let alone in furtherance of - the alleged conspiracy.

The fact is that the principal Commonwealth witness testified from the grave through his son, through Nick Saittis and through David Peters. The Commonwealth was thereby able to present to the jury uncorroborated, unverifiable testimony that confrontation by appellant of his accuser, without cross-examination of the primary source of the evidence, and, what is fundamentally important for the purpose of this appeal, without challenge by trial counsel. Thus, in my view, this conviction is obscured by the unconstitutional clouds of the absence of an accuser and the presence of ineffective counsel.

It is upon that basis that I would vacate the judgement of sentence and remand for an evidentiary hearing upon the failure of trial counsel to voice objection to the myriad presentations of evidence from Michael Hanna, Sr.

COMMONWEALTH OF PENNSYLVANIA	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA
vs.	
JOHN M. KERR, Appellant	No. 121 C.D. 1984 CHARGES: BRIBERY *et al.*

OPINION

John M. Kerr, a lawyer formerly employed by the Commonwealth of Pennsylvania, has been found guilty of a scheme of political malpractice and felonious fundraising perpetrated upon willing victims who purchased their jobs in the office of former Auditor General Al Benedict. The money paid for those jobs has disappeared, Mr. Kerr's principal coconspirator has testified from his grave, and Mr. Benedict has retired from public office.

As defense counsel told the jury in his opening address, this is a sad day for the American political system, a sad day for Pennsylvania, and a sad day for John Kerr, who woke up one morning to newspaper headlines based on the testimony of people with whom you would not want to be seen in public. The overwhelming evidence reveals serious misconduct involving a gross and systematic breach of the public trust.

Mr. Kerr is no stranger to public life, having been a politically active individual since his teenage years. His loyal service as a campaign chairman for Al Benedict in 1976 earned him the appointive position of Executive Deputy Auditor General when Mr. Benedict was elected a Pennsylvania's Auditor General. In that position, John Kerr was the person principally responsible for filling the seven or eight hundred staff positions in the Auditor General's Office, most of which were patronage jobs.

The patronage system of hiring in government is a legal, ethical and moral tradition in our political process whereby available jobs are given to qualified applicants who have demonstrated support for politicians and political parties through volunteer work or other contributions to campaigns for elective office. Soliciting contributions finances a political campaign, getting out votes wins the race, and to the winner goes the spoils, the jobs to be given as the duly elected officer pleases.

Patronage is the defense of John Kerr, who denies ever receiving or soliciting money in exchange for his decision to place anyone on the payroll. Rather, the defense argued to the jury that the buck stopped in Washington County, home of the late Michael J. Hanna, Sr., one of Pennsylvania's most powerful county chairmen of the Democratic party, and an influential force to be reckoned with by anyone seeking statewide office such as Mr. Benedict.

There is no question that jobs were sold by someone in this case, which in its early stages was the subject of an internal investigation by the Auditor General's Office, and later developed into a statewide grand jury investigation resulting in the charges against John Kerr and others. The role of Michael Hanna, Sr. will never be entirely clear because he died shortly after his arrest and incarceration on similar related charges.

The Commonwealth's theory was that Michael Hanna, Sr. was the political "fixer" in southwestern Pennsylvania who was in charge of a scheme whereby his "bagmen" would solicit the cash "contributions" and collect the job "applications" for transmittal to John Kerr, who would then place the loyal supporters on the Commonwealth payroll, and put the money in Al Benedict's campaign "war chest".

The defense theory was that Michael Hanna, Sr. was indeed a "fixer" but never had to pay a dime for a patronage job and could

get one for a phone call to officials at all levels of government. After pocketing the money from his "bagmen", it was said that Hanna would simply use his considerable power to request and receive the job placements.

Whether Michael Hanna, Sr. obtained the jobs for his "applicants" because of his political influence as a patronage boss (the defense position), or because the cash was turned over to John Kerr (the prosecution theory) was the ultimate jury question. In 139 of 216 counts charging various bribery and related offenses, the jury resolved that question against Mr. Kerr and found him guilty.

I.

In these post-verdict motions for a new trial or in arrest of judgment, the principal contention is that "the amalgamation of the profuse and repeated admissions of hearsay testimony by severely prejudiced the defendant and deprived him of a fair trial." The hearsay referred to consists of statements of the deceased Michael Hanna, Sr. made to his "bagmen" Nick Saittis and David Samuel Peters, and to his son and confidante Michael Hanna, Jr. about passing the job sale money to John Kerr.

These statements directly implicated John Kerr in the job selling conspiracy charged, and the Commonwealth argues they were admissible under the "coconspirator exception to the rule against hearsay because they were made during the term of the proven conspiracy and in furtherance of its criminal objectives. *Commonwealth v. Dreibelbis*, 493 Pa. 466, 475 (1981). This exception applies even though the statements were not made in the presence of the coconspirator, where the coconspirator declarant is not on trial, and even if no conspiracy is charged. *Commonwealth v. Garrison*, 398 Pa. 47, 51 (1959).

To lay the foundation for this exception, the Commonwealth

must prove: (1) a conspiracy existed between the declarant and the person against whom the evidence is offered; and (2) the statements sought to be admitted were made during the course of the conspiracy. See *Commonwealth v. Basile*, 312 Pa. Super. 206, 212-13 (1983). The existence of a conspiracy may be established inferentially by the relationship of the purported coconspirators, their conduct, and the circumstances surrounding their acts. The most stringent requirement is that the conspiracy be established by evidence other than the statements sought to be admitted, but the order of proof is within the discretion of the court which may, upon only slight evidence of the conspiracy. See *Commonwealth v. Plusquellic*, 303 Pa. Super 1, 7-8 (1982).

The defense does not seriously contend the Commonwealth failed to establish either the existence of a conspiracy or that the statements were made during its term, and the Court agrees the proper foundation was laid for admission of the hearsay according to the rules of law previously discussed. John Clark, the chief investigator within the Auditor General's Office, first established the existence of a job selling scheme, followed by "bagman" Nick Saittis, who then established the means by which the agreement was executed, as well as the roles of the principal parties as he knew them to be from his personal participation. Only after this foundation had been laid was the bulk of hearsay testimony elicited pursuant to the coconspirator exception.

Nevertheless, the defense argues the hearsay testimony was merely the attempt of Michael Hanna, Sr. to "put it on Kerr" alone and conceal his own money-making scheme, and therefore the statements were not in furtherance of the conspiracy to sell employment for cash. This argument overlooks the established principle that attempts to conceal participation in a criminal enterprise are properly considered part of the undertaking, and when the question of whose conspiracy it was went to the jury, they decided the buck did *not* stop in Washington County.

The statements of Michael Hanna, Sr. implicating John Kerr in the job selling scheme, combined with Hanna's delivery of jobs in the Auditor General's Office, and the circumstances that it was Kerr and only Kerr who was in a position to orchestrate such a plan, allowed the jury to infer from the parties' relationships and conduct that the chain of criminal culpability extended from the "bagmen" through the "fixer" directly to the inner sanctum occupied by the defendant. The reliability of the hearsay linking John Kerr to this chain is enhanced by the fact that similarly incriminating testimony was offered by several witnesses, and the likelihood of fabrication for personal gain of any particular witness diminishes sharply in view of such corroboration. Moreover, Mr. Kerr's convictions are not based *solely* on the reported words of Mr. Hanna, but also upon the *direct* testimony of several witnesses about the personal involvement of the defendant.

This case, after all, is more than just the sum of words. It is the impression created by those words and who spoke them, and this is especially so in the proof of the political operations and transgressions charged to John Kerr and Michael Hanna, Sr. When the alleged agreements are made orally, the consideration is cold currency, and the "fixer" is unavailable in his grave, the hearsay testimony challenged by the defense becomes necessary to evaluate the relative culpability of the alleged conspirators. The corroboration of that hearsay by strong circumstantial and direct evidence of Mr. Kerr's complicity in the scheme provides the guarantees of reliability and trustworthiness traditionally required to support an exception to the rule against hearsay.

Although the admission into evidence of a coconspirator's hearsay statements is arguably in conflict with the guarantees of the Confrontation Clause of the Sixth Amendment, the mission of that clause is to advance a practical concern for the accuracy of the truth-determining process by assuring the trier of fact has a satisfactory basis for evaluating the truth of the hearsay state-

ments. In this case, the witnesses who testified as to Michael Hanna, Sr.'s declarations of John Kerr's criminal involvement in the job selling operation were under oath, subject to cross-examination, and their demeanor was observed by the jury, who could evaluate the reliability of information which they *all* claimed to have heard. See *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970). Thus the defendant's right to confront his accusers, including but hardly limited to Mr. Hanna, was adequately preserved under the Constitutional provisions.

II.

A second error assigned to the Court's evidentiary ruling is one of omission. In an effort to show the wealth of Michael Hanna, Sr., allegedly augmented by the approximately $200,000 in job sales cash which John Kerr never saw, was "hopelessly irreconcilable" with his reported income, the defense offered to call as its first witness Mr. Hanna's accountant who prepared his income tax returns for 1973 through 1978. The testimony would have shown that Hanna's income for that period ranged from $30,000 to $70,000 per year, and that the accountant knew of no other sources of income. This offer is predicated on the remark by Michael Hanna, Jr. that his father's "estate" was worth between $3,000,000 and $5,000,000.

The argument is that tracing where the money went is quite relevant in view of the defense that "the buck stopped in Washington County" in the hands of Michael Hanna, Sr. and reversible error is claimed in denying the defense an opportunity to probe the valuation by Michael Hanna, Jr. of his father's estate. *Commonwealth v. Loomis*, 270 Pa. 254, 261-62 (1921) is cited for the principle that admissible proof must be such as is calculated to fairly raise a doubt as the defendant's connection with the crime, and where that evidence is relevant to establishing facts inconsistent with his guilt, and not excluded by an established evidentiary rule, the accused has a fundamental right

to present it in his defense. See *Commonwealth v. Greene*, 469 Pa. 399, 405 (1976).

The Commonwealth answers that defendant's due process right to raise a doubt about his factual involvement is conditioned on two other principles which underlie the *Loomis* decision: (1) the proferred evidence must be relevant to the probative of the sole criminal responsibility of Michael Hanna, Sr. for the job sales; and (2) the defense is not entitled to establish facts which awaken mere conjecture and speculation about where the money went after it was linked to the senior Mr. Hanna.

Much emphasis needs to be placed on what the junior Hanna actually said about his father's and family's money. Under cross-examination during his testimony for the Commonwealth, Michael Hanna, Jr. estimated at $3,000,000 the net worth of the "Hanna family holdings" including numerous family businesses operated during an unspecified period of time between 1979 and 1983 by family members other than or in combination with the senior Hanna. The rejected testimony of his personal accountant for his personal income only in the period from 1973 to 1978 would have shown nothing about the other family businesses, his personal net worth in any given year, his estate's assets, or his unreported but taxable income from criminal operations.

The issue is therefore whether evidence of Michael Hanna Sr.'s reported personal income five to ten years before his death is relevant to establish facts inconsistent with Michael Hanna, Jr.'s offhand remarks at trial regarding the family fortune. The Court agrees with the Commonwealth that the proposition sought to be proven (Senior's retention of all the cash and Kerr's failure to receive any) is not rendered more probable than it would be without the evidence proferred (a snapshot of Senior's reported personal income in years mostly prior to the term of the conspiracy charged), and the evidence was therefore neither relevant to nor probative of the culpability of either Michael

Hanna, Sr. or John Kerr.

Wealth may be acquired in many ways. Selling government jobs is only one, and not a very lucrative one for otherwise successful people. Thus the offer of proof is based upon an erroneous and conjectural premise, and the alleged irreconcilability of chunks of Hanna dollars both legal and illegal proves nothing, at least not in the present forum.

Tantalizing as it may be to speculate on where approximately $200,000 in bribes went, such an accounting is neither relevant nor possible in cases such as this one. So long as the prosecution connects the payment of money (or other "benefits" or "political contributions") with John Kerr's operative decision to hire an employee in the Auditor General's Office, the crimes are complete without regard to whether the money was put in a campaign war chest or spent in Atlantic City. And while the defendant is entitled to prove facts inconsistent with his own guild, such as the sole criminal responsibility of Michael Hanna, Sr., this cannot be done merely by awakening conjecture about how and why this late and powerful county chairman was so wealthy.

Had the defense offered an exhaustive audit of the Hanna family empire, including both "old" inherited money (if any) and "new" earned or extorted funds, a slightly better argument might be made for introducing such collateral matters, because after all, money is both the motivation and the smoking gun in a bribery case. The remaining evidentiary problem is that the precise destination of slush funds to take care of political business is not so easily traced in the absence of reported or otherwise memorialized transactions.

In the criminal political underworld where the fungibility and liquidity of cold currency is essential to the successful execution of a scheme of extortion and bribery, the provable wealth or cash

flow of virtually *anyone* is irrelevant to the central issue of who in fact *got paid* for making decisions entrusted to them by an electorate and for a citizenry whose government has been rather arrogantly ripped off. In such a prosecution, however, the Commonwealth is not required to show where the money went after it was delivered to Kerr, and he is not entitled to pursue a tangential inquiry into his coconspirator's financial history for the purposes stated. Exclusion of the evidence of Hanna's income was therefore proper.

III.

As a corollary to the defense argument on hearsay evidence, it is further asserted that if the Court excises such testimony from the record, the paucity of remaining proof is insufficient as a matter of law to support the convictions. But as the Commonwealth points out, excision of the hearsay evidence, even if improperly admitted, is not permissible under the standard of judicial review for post-verdict motions.

The legal sufficiency of the evidence must be evaluated upon the *entire* trial record, read in the light most favorable to draw all reasonable inferences for the Commonwealth. Most importantly, the Court must consider all evidence *actually* received, whether the trial rulings admitting evidence were right or wrong. See e.g. *Commonwealth v. Barnes*, 237 Pa. Super. 407, 410 (1975) (citing cases).

It is not a question as to whether the trial judge if he had been the trier of fact would have acquitted, but rather whether the evidence would justify a finding of guilt unless the proof relied upon for a conviction is so weak and inconclusive that as a matter of law, no probability of fact can be drawn from the combined circumstances. See e.g. *Commonwealth v. Blevins*, 453 Pa. 481, 487 (1973).

The evidence viewed in this light is more than sufficient to permit a probable inference beyond a reasonable doubt that a job sales scheme existed, that Michael Hanna, Sr. and his bagmen operated it when John Kerr was Executive Deputy Auditor General, and that he was the operative person who committed the acts charged to connect willing buyers with a Commonwealth payroll check. It is not necessary to speculate on the sufficiency of the evidence without the hearsay of a coconspirator, but it may be noted that both circumstantial and direct evidence tends fairly strongly to show a criminal organization which surrounded the defendant, and arguably supports a conviction even if the hearsay had been excluded. As a matter of law, the Court finds there was sufficient evidence in the entire trial record to establish each and every element of each and every offense for which the defendant was convicted beyond a reasonable doubt, and the verdicts will be upheld.

IV.

Next, the defense asserts the legal and logical inconsistencies between the verdicts of acquittal and those of conviction, although no argument has been presented, and the specific nature of the inconsistency is not apparent. The Commonwealth points out that almost all of the charges for which the defendant was acquitted involved the proven payment of cash by someone without subsequent delivery of the job or promotion, and it is therefore entirely within the scope of reason to suppose the jury in those instances determined the Commonwealth failed to carry its burden of proof in connecting receipt of the cash to the man who made these personnel decisions. In essence, the verdicts are said to permit the inference that the "bagmen" or the "fixer" diverted the cash from Mr. Kerr.

For what it's worth, the Court agrees that this is a reasonable analysis of the collective though process of the carefully selected

jury in this case. But this concurrence in the factual explanation of the acquittals is merely *dictum*, because it is well established that consistency among verdicts in a single prosecution is not required as a matter of law, nor is it a cause for setting aside a guilty verdict. See *Commonwealth v. Parrotto*, 189 Pa. Super. 415, 419-20 (1959) (citing cases).

An acquittal on some counts cannot be interpreted as a specific finding in relation to some of the evidence. Certain acquittals may be viewed as the jury's assumption of powers of compromise which they had no right to exercise, but to which they were disposed through lenity, or as a possible mistake. *Commonwealth v. Carter*, 444 Pa. 405, 408 (1971). But so long as the challenged verdicts are supported by sufficient evidence, a reviewing Court will not delve into the thought processes of the jury. *Commonwealth v. Graves*, 310 Pa. Super. 184, 198 (1983).

The rationale for the rule of law regarding inconsistent verdicts is derived from the seminal case of *Dunn v. United States*, 284 U.S. 390 (1932), and has been reaffirmed recently in *United States v. Powell*, 469 U.S. ____, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984). The case rejected exceptions to the rule developed by some Courts of Appeals, and held there is no reason to vacate convictions merely because the verdicts cannot be rationally reconciled, even where the government concedes the inconsistency. And while the Supreme Court did not intend to decide the proper resolution of a situation where a guilty verdict on one count logically excludes a finding of guilt on the other, the verdicts in this case do not present such a situation, and the Court will not upset them.

V.

Finally, the defense claims in supplemental post-verdict motions the trial court erroneously denied a pretrial motion to sever certain counts of the information comprising two separate conspiracies which were improperly joined for prosecution with

the other substantive offenses. As a result of the alleged misjoinder, the Commonwealth was allowed to create a "spill-over" of cumulative evidence to unlawfully "bootstrap" the charges, when no single offense or conspiracy was established by sufficient relevant and admissible proof for that offense or conspiracy standing alone. While the argument must be rejected as a interesting but unpersuasive convolution of the law of joinder, it also is unsupported by the facts, and misstates the procedural history of this case.

The pretrial motion to sever certain counts of the information was based on the assertion that John Kerr's conduct in the John Cotter and Sanford Aderson incidents was merely an overbearing pitch for legitimate campaign support from loyal employees, and not an illegal act. But the Commonwealth noted prior to the pretrial hearing that a demand for *any* benefit, whether monies to John Kerr or to the Friends of Al Benedict, was criminally actionable under 18 Pa.C.S. §§4701(a)(2) and (3), and a political contribution is specifically included in the conflict prohibition of 65 P.S. §403(b). The defense then *withdrew* the motion to sever in open court, and at no point prior to filing the supplemental post-verdict motion was there any renewed objection to joinder of any number of conspiracies or separate offenses.

Nor could such an objection be sustained then or now. Under the standard for permissible joinder of separate criminal offenses, evidence of other crimes and conspiracies may be introduced in a trial to prove: (1) motive; (2) intent; (3) absence of mistake or accident; (4) *a common scheme, plan or design* embracing commission of two or more crimes so related to each other that proof of one tends to prove the other; or (5) to establish the identity of the person charged with the commission of the crime on trial; in other words, where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the

other. See *Commonwealth v. Morris*, 493 Pa. 164 (1981); Pa.R.Crim.P. 1127A(1)(a).

The fact that John Kerr was found not guilty on the John Cotter counts among others is a clear indication that the jury was able to separate the individual episodes alleged in all 216 counts without danger of confusion. Except for the unnecessary and perhaps impossible proof of where the money went pursuant to the illegal scheme, there is no difference in the way the entire scenario unfolded in regard to any of the counts on which Mr. Kerr was found guilty. The essential role he played was a constant throughout the entire term of the criminal episode.

All offenses charged were dependent upon an overall course of conduct and a common scheme; all tend to establish the identity of John Kerr as the person who made the illegal scheme possible by providing the jobs to be delivered on payment of cash; all show a common intent and motive to violate laws whose prohibitions were well-known to him; and lastly, all are pertinent to show the absence of *any* mistake or accident about the role of the one-time Executive Deputy Auditor General in that scheme or agreement. See *Commonwealth v. Stauffer*, 309 Pa. Super. 176, 185-86 (1982).

Accordingly, we enter the following

ORDER

AND NOW, this 7 day of March, 1985, the post-verdict motions filed on behalf of John M. Kerr are denied, and the Attorney General is directed to call him for sentencing.

BY THE COURT

William W. Lipsitt, Judge

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DIST[illegible]ICT

COMMONWEALTH OF PENNSYLVANIA Appellee v. CHARLES PIERCE Appellant	No. 47 E.D. Appeal Docket 1986 Appeal from the Judgment of Superior Court Entered at No. 2763 Philadelphia 1981 on September 6, 1985, Affirming the Judgment of Sentence of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, at No. 2565 October Term, 1980, on November 20, 1981. 345 Pa. Superior Ct. 324, 498 A.2d 423 (1985) Submitted: December 5, 1986

DISSENTING OPINION

JUSTICE ZAPPALA FILED: June 9, 1987

A popular and indeed cogent axiom states "if it ain't broke don't fix it". Furthermore, there is a far more important and cherished principle that has been the foundation of criminal jurisprudence in this nation which simply provides that a person is presumed innocent and his guilt must be proven by his accusor. With these two tenets in mind, I must respectfully dissent from the majority's holding here today.

The majority once again seizes upon public clamor to walk in lockstep with our federal brethren. We have once again abandoned our coveted position of being a leader among this nation's judiciary and relegate ourselves to a position of "follower of federalism". In moving along this path, the majority of this Court has disregarded this Commonwealth's reputation for both fairness and ex-
cellence.

I am convinced that the standard this Court set in 1967 in *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967) is a fair and appropriate standard upon which to measure claims of ineffectiveness of counsel and should be retained in this Commonwealth independent of the United States Supreme Court's addition of an "actual prejudice" component to that standard. I realize, however, that the majority of this Court is of the opinion that the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) is the proper standard under which to judge ineffectiveness. I respect the majority's prerogative to so decide. My difficulty here is with the impercipience of the majority in its denial of the fact that *Washington* and *Strickland* are two distinct standards which cannot coexist. The majority, rather than acknowledging the obvious distinction between *Washington* and *Strickland*, stating the desire of the Court to adopt the "actual prejudice" component, and specifically overruling *Washington*, instead chooses to argue away both the clear intent of the *Washington* Court and the obvious distinctions. In so doing, the Court weakens and confuses the law in this area. At the time *Strickland*, 104 S.Ct. at 2076-77 (Marshall, J. dissenting) (emphasis supplied).

I must also take issue with the majority's conclusion that the Pennsylvania Constitution as applied in *Washington* does not create a greater protection than the Federal Constitution as interpreted by *Strickland* and that "[t]he fact of the matter is that the identical textual and policy considerations logically lead us to hold that together they constitute an identical rule of law in this

Commonwealth." (Slip Opinion at 10, footnote omitted). This conclusion is flawed because the premise underlying it is flawed. The majority's misperception of the "obvious identical textual and policy considerations" in the two tests, I have already pointed out.[2] As to the constitutional aspect, the majority ignores our line of cases which state that "[t]his court has not hesitated to interpret the Pennsylvania Constitution as affording *greater* protection to defendants than the federal Constitution." See, *Commonwealth v. Sell*, 504 Pa. 46, 64, 470 A.2d 457, 467 (1983) (emphasis supplied) and cases cited thereunder. The United States Supreme Court now restricts the rights of defendants because "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between an attorney and client," *Strickland*, 104 S.Ct. at 2066 and "to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result," *Id.* at 2069. We need not follow in blind obedience. I read the above quoted policy considerations underlying Strickland as an attempt by the United States Supreme Court to redefine what proper representation of counsel entails. In so doing, it appears that that court would obviate any requirement that a court hold a criminal defense attorney to the same standard of professional conduct generally mandated by the profession. If one interprets the court's policy considerations in the context of its holding in *Strickland* and takes that analysis to its logical extreme, it appears that they would hold that even the most ill-prepared attorney, filled with "sloth or lack of awareness of the alternatives" need not concern himself with his unprofessional conduct in the defense of a criminal defendant so long as he can be reasonably confident that there is overwhelming evidence of that defendant's guilt. When the highest court in this nation deems it proper to place concern over the burdens and responsibilities imposed upon a professional attorney over those of a criminal defendant in interpreting our country's constitution, I

must respectfully part company with that line of reasoning and speak out in support of the broad, independent right of protection this Commonwealth has always granted to its citizens; even its citizens who stand *accused* of a crime.

We have seldom succumbed to the pressure of the United States Supreme Court's interpretation of the Federal Constitution when its provisions have been interpreted narrowly and in derogation of the rights this Commonwealth has deemed appropriate to protect its citizens. In the majority's great haste to cast off the independent rights we have conferred upon the citizens of this Commonwealth in exchange for the simplicity of becoming homogeneous with the United States Supreme Court, and thereby allowing them to make decisions and conduct analysis in our stead, we have failed to be mindful of the concerns expressed by Mr. Chief Justice (then Justice) Nix in *Commonwealth v. Sell, supra*, where, in undertaking to interpret our State Constitution in terms of the Federal Charter he observed:

> [W]e find guidance in the admonitions of Mr. Justice Brennan of the United States Supreme Court:
>
> > [T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scru-

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[1] I note that the majority's opinion is devoid of *any* citation or discussion of policy considerations in this Commonwealth that would support its contention that we are of the same mind as the *Strickland* court and have been so since the time of *Washington*. I cannot, therefore, point to their misperceptin of our policy considerations as they relate to ineffectiveness. The fact of the matter is, I cannot honestly argue that they have been misperceived, only ignored.

> tinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.
>
> *Brennan, State Constitutions and the Protection of Individual Rights*, 90 Harv. L.Rev. 489, 502 (1977).

Sell, 504 Pa. at 49, 470 A.2d at 459. Had the majority not acted in such haste as it embraced a mechanical application of *Strickland*, it would not now be in the unenviable position of attempting to force a "square peg into a round hole".

In further support of my contention that the majority has totally ignored not only the proper application of precedent in this Commonwealth, but also the distinction between our State Constitution and the Federal Charter, I note with interest the majority's citation to *Delaware v. Van Arsdall*, ____ U.S. ____, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), (Slip Opinion at 10-11, footnote 4) which the majority reads as being "an indication that the United States Supreme Court will expect, in the future, that state tribunals conduct ineffectiveness analyses via a performance and prejudice standard which, as already has been shown, is our standard." *Id.* at footnote 4. This statement, not only ignores the context in which the *Van Arsdall* decision was rendered, but again reveals the majority's perceived omnipotence of that federal court. It is clear that no derivation power can be pointed to which would allow that court to dictate to any state court, analyzing a question arising under its state constitution, the proper standard to be applied in a situation where that standard is being reviewed under a state constitution which provides greater protection than the minimum set forth under the Federal Charter. In *Van Arsdall*, it should be noted, the claim of ineffectiveness was addressed solely under the Sixth Amend-

ment. For that reason, and that reason alone, it was proper for the Supreme Court to remand to the Delaware Court for proper application under the substantive standards of the Sixth Amendment as interpreted by the Supreme Court.

As Mr. Justice Marshall noted in his dissent in *Van Arsdall*, however: I also write to emphasize that this Court cannot *require* state courts to apply harmless-error analysis to violations of the Federal Constitution. See, *Connecticut v. Johnson*, 460 U.S. 73, 88, 103 S.Ct. 969, 978, 74 L.Ed.2d 823 (1983) (Stevens, J. concurring in judgment). While this Court has stated that federal law governs the application of harmless error to violations of the Federal Constitution, *see Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 826, 17 L.Ed.2d 705 (1967), that cannot mean more than that state courts *must* reverse convictions when the Constitution so mandates. When the Constitution does not mandate a particular remedy, this Court may not 'declare which of many admittedly constitutional [remedial] alternatives a state may choose.' *Id.* at 48, 87 S.Ct., at 840 (Harlan, J. dissenting) (footnote omitted). We have never held that the Federal Constitution forbids state courts from reversing certain convictions pursuant to state substantive or procedural law, nor can I imagine what provision of the Constitution could grant us such power. Thus, the Delaware Supreme Court remains free on remand to decide that even though it applied the substantive standards of the Sixth Amendment to determine whether error occurred, its harmless error analysis was the product of state rather than federal law.

Van Arsdall, 106 S.Ct. at 1440-41 (Marshall, J. dissenting) (emphasis in original). I must therefore reject outright any inference which could be drawn from the majority's observations of the Supreme Court's intent in Van Arsdall, as indicating *this* Court's willingness to abdicate *any* of its interpretive functions

where an appellate question implicates rights guaranteed under *our* state constitution.

As we continue to place greater, and at times insurmountable burdens of proof upon a defendant, as a majority does today, we increasingly retreat to the ancient precept that a criminal defendant is cloaked in the presumption of *guilt* until he proves his innocence. It was, in large part, for this very reason, the harsh results experienced in the jurisprudential application of the presumption of guilt that prompted the migration of the Europeans to this Commonwealth over 200 years ago. The inequity of that system was that many innocent individuals suffered punishment because they could not overcome the overwhelming burden of proving themselves innocent of charges, the evidence of which was in the sole possession of the accusors. I do not choose to move one step closer to that system. I must therefore dissent from what I characterized in *Christy* to be nothing more than a move by this Court toward a "short-cut, result-oriented practice of jurisprudence." *Commonwealth v. Christy*, 511 Pa. 490, ____, 515 A.2d 832, 847 (1986) (Zappala, J. dissenting).